NOS. 87-6026 & 87-5666

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

HEATH A. WILKINS, Petitioner
- versus -
STATE OF MISSOURI, Respondent

JOSE MARTINEZ HIGH, Petitioner
- versus -
WALTER ZANT, WARDEN, Respondent

On Writs Of Certiorari To The Supreme Court Of Missouri And United States Court Of Appeals For The Eleventh Circuit

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BRIEF OF AMICI CURIAE FOR RESPONDENTS MISSOURI AND GEORGIA BY KENTUCKY AND ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, INDIANA, MISSISSIPPI, MONTANA, NEVADA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA, AND WYOMING

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INTERESTS OF AMICI CURIAE IN SUPPORT OF RESPONDENTS, THE STATES OF GEORGIA AND MISSOURI

The amici curiae represented here are States having an interest in whether or not the Eighth and Fourteenth Amendments automatically exempt 16 and 17 year old murderers from capital punishment by reason of those killers' age.

Amici submit this brief in support of respondents, the States of Georgia and Missouri, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

The courts below correctly held that the Eighth Amendment does not endow teenaged murderers with an automatic exemption from capital punishment. Wilkins v. State, Mo., 736 S.W.2d 409 (1987); High v. Kemp, 819 F.2d 988 (11th Cir. 1987). To rule otherwise would substantially depart from the longstanding premise of this Court that capital cases must be given individualized consideration. It would also interfere with the

prerogative of State legislatures whose function is to determine public policy concerning crimes and punishments.—

All the States consider the special mitigation of youth in assessing criminal responsibility, but recognize there are many exceptions to the general rule. This commonsense approach is reflected by legislative recognition of an age range in which the presumption of immaturity may be rebutted in a particular case. State legislatures set the maximum age for juvenile court jurisdiction as high as they do to benefit every arguably immature offender, even at the obvious expense of including many individuals who do not deserve such protection. By reaching safely beyond the common denominator of chronological immaturity, the States are justified in examining each such offender individually to determine whether an exception should be made in his or her particular case. Doing so tends to avoid the obvious unfairness of exposing virtually indistinguishable killers to vastly different potential punishments.

There is no societal consensus against the execution of 16 and 17 year old murderers. Of the 36 States having the death penalty, 25 authorize that punishment for 16 and 17 year old capital offenders. Even the 14 non-capital States subject killers of this age to their most severe penalties. Thus, 50% of all States expose this age group to capital punishment, 69% of all death penalty States do so, and 78% of all States impose their most severe authorized penalty upon such offenders. A non-capital State's failure to authorize the death penalty for persons of any age cannot reasonably be interpreted as a policy conferring leniency upon teenagers.

Neither would it be logical to assume that any State has unwittingly exposed its juveniles to capital punishment. All the death penalty States have enacted or amended their juvenile jurisdiction transfer statutes after they authorized capital punishment. It is a universal and necessary rule of statutory construction to assume that the legislature is cognizant of its prior enactments.

ARGUMENT

THE EIGHTH AND FOURTEENTH AMENDMENTS DO NOT IMMUNIZE 16 and 17 YEAR OLD MURDERERS FROM CAPITAL PUNISHMENT SIMPLY BY REASON OF THEIR CHRONOLOGICAL AGE.

I.

THOMPSON V. OKLAHOMA IS NOT DISPOSITIVE OF THESE CASES

The question at issue is whether or not the legal execution of 16 and 17 year old murderers would, by reason of their birthdates, amount to cruel and unusual punishment *per se* under the Eighth and Fourteenth Amendments.

In urging the Court to draw a "bright line" exempting all killers under the age of 18 years from capital punishment, petitioners and their *amici* rely primarily upon *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687 (1988)(plurality decision). They attach significance to the fact that all eight of the Justices who sat on the *Thompson* Court either found (four), or at least expressly assumed (four), the existence of *some* age limit for the death penalty. Petitioners now contend that the same considerations which led to the result in *Thompson* should likewise control the decision here.

For various reasons, however, Thompson is not at all dispositive of these cases. First, less than a majority of this Court found that a "national consensus" of any kind exists on the subject of limiting capital punishment according to age. Although the four-Justice plurality in Thompson found the existence of a national consensus on the subject, neither the concurring opinion of Justice O'Connor nor the three-Justice dissent concluded that such agreement on the matter exists among the States.

Thus, less than a majority of this Court actually declared a specific minimum age limit for capital punishment, and in drawing their "bright line" at below age 16 even the plurality expressly left open the question concerning killers above that age:

> [Thompson's] counsel and various amici curiae have asked us to "draw a line" that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.

Thompson at 2700 (plurality opinion).

Next, as explained at greater length in Argument V of this brief, those who in Thompson were able to divine a national consensus against the capital punishment of 15 year old murderers will find substantially less evidence to support that conclusion where 16 and 17 year olds are concerned. A significantly larger number of States authorize such legal executions, hence the relatively greater number of 16 and 17 year old killers being sentenced to death by judges and juries throughout the country.

The presumption of a 16 or 17 year old's immaturity is more easily rebutted than that of a younger person who, unlike the petitioners in these cases, is neither emancipated nor stands at the threshhold of adulthood.[1/] The greater ease

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1/. Jose High was still living at home (Habeas Corpus 52, 54) but had been traveling across the country to New Jersey and Philadephia with two fellow criminals whom he considered his subservient "family." (Trial 564, 775, 790). Filed after the granting of certiorari in his case, Georgia's suggestion of mootness raises a serious question as to whether High was even a juvenile when he executed 11 year old Bonnie Bulloch.

with which this presumption may be reliably rebutted arises from common human experience and observation that is reflected by State juvenile transfer statutes. States universally recognize, as well they should, that some individuals of this age deserve to be treated as adults[2/] while others do not. This is why State legislatures take the precaution of drawing the line for juvenile court jurisdiction at an age high enough to include every offender who might reasonably deserve a presumption of immaturity. Then, having obviously reached beyond the common denominator with such arbitrary line-drawing, States are justified in identifying the true adults among that group and punishing them as such on a case-by-case basis.

Petitioners also seek support from Justice O'Connor's concurring opinion in Thompson, attempting to characterize it as a view that any capital sentencing statute is invalid for want of

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2/. So does this Court. See, e.g., Fare v. Michael C., 442 U.S. 707, 734, n.4 (1979)(Justice Powell dissenting); Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

specificity unless the particular provision itself sets an age limit.[3/] They would interpret Justice O'Connor's opinion as a constitutionally required format for arranging the provisions of each State penal code.

Respondents' amici do not view the Thompson concurrence quite so simplistically. The concern expressed by Justice O'Connor was not how a State manifests its intention to capitally punish 15 year old murderers. Rather, her concern was whether the State had actually intended to do so:

> Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old

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3/. Carried to its logical conclusion, the petitioners' interpretation of the Thompson concurrence would uphold the specified execution of a 16 year old while at the same time invalidating the unspecified execution of a 17 year old killer.

> defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.

Thompson at 2710-2711 (concurring opinion), (emphasis added).

Absent "the earmarks of careful consideration", Justice O'Connor chose to err on the side of caution in "this unique situation." Id. at 2711. Such reasoning presumably would not apply where a State in one way or another has demonstrated that it considered a minimum age for capital punishment. As detailed in Argument III of this brief, neither should such a result obtain where it may safely be assumed that the legislature was cognizant of the death penalty statute's reach.

II.

PUNISHMENT IS A QUESTION OF LEGISLATIVE POLICY AND ANY EIGHTH AMENDMENT ANALYSIS MUST GIVE APPROPRIATE DEFERENCE TO THE LEGISLATURE.

The plurality, concurring, and dissenting opinions in Thompson all agree that views of society and contemporary moral standards are reflected by the enactments of legislative

bodies.

> It will rarely if ever be the case that the members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

Thompson at 2715 (Justice Scalia dissenting).

Twenty-five States[4/] authorize the execution of 16 and 17 year old murderers. In order to accept petitioners' argument that evolving standards of decency proscribe execution of any person under 18, the standards of decency as evidenced by the legislative enactments of half of these United States must flatly be rejected.

4/. Ala.Code §12-15-34(a); Ariz.Rev.Stat.Ann. §8-202 and Ariz.Rules of Proc. for Juvenile Court 12 & 14; Ark.Code Ann.§§5-1-116(b) & 5-10-101; 10 Del.Code Ann.§938(a)(1) and 11 Del.Code Ann.§§636 & 4209; Fla.St.Ann.§39.02(5)(c)(1); Ga.Code Ann. §17-9-3; Idaho Code §16-1806(1)(a); Ind.Code Ann. §35-50-2-3(b); Ky.Rev.Stat. §640.040(1); La.Rev.Stat.Ann.§§14:30 & 13:1570(A)(5); Miss.Code Ann. §43-21-151 (3); Mo.Rev.Stat.§211.071.1; Mont.Code Ann. §41-5-206(1)(a)(i) & §45-5-102; Nev.Rev.Stat. §176.025; N.H.Rev.Stat.Ann.§§21-B:1, 630.1(v) and 630.5(X111); N.C.Gen.Stat.§74-608 & 13-17; 10 Okla.Stat.Ann.§1104.2 & 1112(b); 42 Pa.Cons.Stat. Ann.§§6322(a)(1978), 6355(a)(2); S.C.Code Ann.§20-7-430(6); S.D. Codified Laws Ann. §§26-8-7 & 26-11-4; Tex.Penal Code Ann. §8.07(d); Utah Code Ann. 78-3a-25(1); Va. Code Ann. §16.1-269(A); Wash.Rev.Code §9A.32.030(2), 10:95.020 & 13.40.110(1)(a); Wyo.Stat.§14-6-237.

> The deference we owe to the decisions of the state legislature under our federal system [citation omitted] is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." [citations omitted].

Gregg v. Georgia, 428 U.S. 153, 177 (1976).

> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 176.

If petitioners' bright-line standard is adopted, this "heavy burden" is ignored.

III.

IT IS UNIVERSALLY AND NECESSARILY PRESUMED THAT LEGISLATURES ARE AWARE OF THEIR OTHER ENACTMENTS, AND OF THE PRIOR INTERPRETATIONS GIVEN TO SUCH STATUTES, WHEN ENACTING A SUBSEQUENT STATUTE.

Contrary to the assertions of the petitioners, these cases do not turn on the organizational structure of the States' capital

sentencing schemes. While their chief contention is that juveniles are invariably too immature for capital punishment despite any and all countervailing indicia, they alternatively posit the one-Justice Thompson concurrence as prescribing the only constitutional means by which a juvenile death penalty statute may be enacted. According to the petitioners and their amici, juveniles cannot be subjected to the death penalty unless the capital sentencing statute itself specifies a minimum age. Otherwise, they claim, by setting the minimum age in a separate juvenile waiver statute without mentioning it again in the capital sentencing provision, the legislature might not realize that such youthful killers would be subject to the death penalty.

The fallacy of such reasoning is self-evident. Some State legislatures, for example, have arranged their penal codes so that crimes are defined in one chapter while the various penalties and defenses therefor are provided in another. Presumably, not even the petitioners would seriously allege that such an

organizational format renders the entire penal code invalid for failure of one provision to specifically refer to another.

> It is always appropriate to assume that our elected representatives, like other citizens, know the law. . . we are especially justified in presuming both that those representatives were aware of the prior interpretation. . . and that their interpretation reflects their intent. . . .

Cannon v. University of Chicago, 441 U.S. 677, 696-698 (1979). See also, e.g., Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 319 (1983); Shapiro v. United States, 335 U.S. 1, 16 (1947); Lewis v. United States, 445 U.S. 55, 61-64 (1980); Roche Products v. Bolar Pharmaceutical Co., 733 F.2d 858 (D.C. Cir. 1984); Florida Nat. Guard v. Federal Labor Rel. Authority, 699 F.2d 1082 (11th Cir. 1983); Martin v. Luther, 689 F.2d 109 (7th Cir. 1982); United States v. Professional Air Traffic Controllers, 653 F.2d 1134 (7th Cir. 1981); Air Transport, Etc. v. Profess. Air Traffic, Etc., 667 F.2d 316 (2nd Cir. 1981); Anderson Seafoods, Inc. v. Graham, 529 F.Supp. 512 (N.D. Fla. 1982); Anderson v. Black & Decker, 597

F.Supp. 1298 (E.D. Ky. 1984); Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984); In re Misener, 213 Cal.Rptr. 569, 38 C.3d 543, 698 P.2d 637 (1985); Ingram v. Cooper, Colo., 698 P.2d 1314 (1985); State v. Dupree, 196 Conn. 655, 495 A.2d 691 (1985); Giuricich v. Emtrol Corp., Del., 449 A.2d 232 (1982); State v. Dunmann, Fla., 427 So.2d 166 (1983); Leonard v. Benjamin, 253 Ga. 718, 324 S.E.2d 185 (1985); Marsland v. Pang, 5 Hawaii App. 463, 701 P.2d 175 (1985); People v. Palmer, 84 Ill.Dec. 658, 104 Ill.2d 340, 472 N.E.2d 795 (1984); Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc., Ky., 690 S.W.2d 393 (1985); Bunch v. Town of St. Francisville, La.App., 446 So.2d 1357 (1984); Mayor and City Council of Baltimore v. Hackley, 300 Md. 277, 477 A.2d 1174 (1984); People v. Smith, Mich., 378 N.W.2d 384 (1985); Kilowatt Organization (TKO), Inc. v. Dept. of Energy, Planning and Development, Minn., 336 N.W.2d 529 (1983); Holt v. Burlington Northern R. Co., Mo.App., 685 S.W.2d 851 (1984); Thiel v. Taurus Drilling Ltd., Mont., 710 P.2d 33 (1985); Douglas County v. State, 210 Neb. 762, 316 N.W.2d

767 (1982); Boulder City v. General Sales Drivers, etc., 101 Nev. 117, 694 P.2d 498 (1985); Mahwah Tp. v. Bergen County Bd. of Taxation, 98 N.J. 268, 486 A.2d 818 (1985); Garrison v. Safeway Stores, 102 N.M. 179, 692 P.2d 1328 (1984); Arbegast v. Board of Ed. of South New Berlin Cent. School, 490 N.Y.S.2d 751, 65 N.Y.2d 161, 480 N.E.2d 365 (1985); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Clark, N.D., 367 N.W.2d 168 (1985); Commonwealth v. Milano, 300 Pa. Super. 251, 446 A.2d 325 (1982); State v. Feiok, S.D., 364 N.W.2d 536 (1985); Brown-Forman Distillers Corp. v. Olsen, Tenn.App., 676 S.W.2d 567 (1984); Driscoll v. Harris County Com'rs. Court, Tex.App., 688 S.W.2d 569 (1985); Murray City v. Hall, Utah, 663 P.2d 1314 (1983); State v. Peterson, 100 Wash.2d 788, 674 P.2d 1251 (1984); Pullano v. City of Bluefield, W.Va., 342 S.E.2d 164 (1986); In Interest of P., 119 Wisc.2d 349, 349 N.W.2d 743 (1984); Capwell v. State, Wyo., 686 P.2d 1148 (1984).

Carried to its logical conclusion, the petitioners' interpretation of the Thompson

concurrence would exempt juvenile murderers from non-capital punishments as well as from the death penalty. According to their analysis, a teenaged killer could not even be sentenced to life in prison unless the homicide statute itself specified a minimum age limit. Such an approach is neither reasonable nor required by the Eighth Amendment.

It would be unrealistic to conclude from statutory format alone that a State has failed to appreciate or seriously consider the scope of its death penalty law. Indeed, all 36 of the death penalty States[5/] have either passed or amended in some manner their juvenile waiver statutes after they authorized capital punishment: Ala.Code §12-15-34(a)(Repl.1982); Ariz.Rev.Stat.Ann. §8-202 (1974), Ariz. R.P. Juv.Ct. 12, 14; Ark. Code Ann.

5/. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming.

§§885-1-116(b), 5-10-101 (1987); Cal.Pen.Code §190.5 (1988); Col.Rev.Stat.§16-11-103 (1)(a)(Repl.1986); Conn. Gen.Stat.Ann. §53a-46a(g)(1) (1987); 10 Del.Code Ann. §938(a)(1)(1975), 11 Del.Code Ann. §§636, 4209 (Repl. 1987); Ga. Code Ann. §17-9-3 (1982); Fla.Stat.Ann. §39.02(5)(c)(1)(Supp. 1988); Idaho Code §816-1806 (1)(a)(Supp. 1988); 38 111.Ann.Stat. §9-1(b)(Supp. 1988); Ind. Code Ann.§ 35-50-2-3(b)(Supp. 1988); Ky.Rev.Stat. §640.040(1)(Supp. 1987); La. Rev.Stat.Ann. §§614.30, 13:1570(A)(5)(1986); 27 Md. Code §412(f)(Repl. 1988); Miss. Code Ann.§43-21-151(3)(Supp. 1987); Mo.Rev. Stat. §211.071.1 (1986); Mont. Code Ann. §§41-5.206(1)(a)(i), 45-5-102 (1987); Nebr. Rev. Stat. §28-105.01 (1985); Nev. Rev. Stat. §176.025 (1987); N.H. Rev. Stat. Ann. §§21-B:1, 630.1 (V), 630.5 (XIII)(1986, Supp. 1987); N.J. Stat. Ann. §§2A:4A-22(a), 2C:11-3(g)(Repl. 1987, Supp. 1988); N.M. Stat. Ann. §§28-6-1(A), 31-18-14(A)(Repl. 1987); N.C. Gen.Stat. §§74-608, 14-17 (Supp. 1987); Ohio Rev. Code Ann. §2929.02(A)(1986); 10 Okla. Stat.Ann. §§1104.2, 1112(b)(1987); Ore. Rev. Stat. §§161.620, 419.476(1)(1987); 42 Pa. Cons.Stat.Ann.

§6322(a)(1978) & §6355(a)(1)(1982); S.C. Code Ann.§20-7-430(6)(1985); S.D. Cod.L.Ann. §§26-8-7, 26-11-4 (1984); Tenn. Code Ann.§§37-1-102(3), 37-1-134(a)(1); Tex. Pen.Code Ann. §8.07(d)(Supp. 1988); Utah Code Ann. §78-3A-25(1)(1987); Va. Code Ann. §16.1-269(A)(Repl. 1988); Wash.Rev. Code §§9A.32.030(2), 10.95.020, 13.40.110(1)(a)(1988, Supp. 1988); Wyo.Stat. §14-6-237 (1986).

It is a necessary rule of statutory construction to assume that one legislative hand knows what the other has done, and this is an especially safe assumption given the relative timing of the enactments and revisions at issue here. In view of all the foregoing, it would be less than credible to assert that any State has unwittingly exposed youthful murderers to capital punishment.

IV.

THE LAWS OF NON-DEATH PENALTY STATES SHOULD BE COUNTED AS SUPPORTIVE OF RESPONDENTS, RATHER THAN PETITIONERS, IN DECIDING WHETHER A NATIONAL CONSENSUS EXISTS ON THE PUNISHMENT OF JUVENILE MURDERERS.

Fourteen States adopt a minority position that capital punishment should never be inflicted

upon persons of any age. Consequently, the Thompson plurality did not consider any of the laws of these 14 States as holding 15, 16, and 17 year olds culpable and accountable for the crime of murder. Respondents' amici believe such examination is necessary. It refutes the theory there is a societal consensus that 15, 16 and 17 year olds are categorically less accountable for their acts and should therefore be excluded from imposition of a State's most severe punishment for its most severe violent crime - murder.

The 14 non-capital States either have no juvenile court jurisdiction over 16 and 17 year olds or can waive them to be tried as adults for the crime of murder. All 14 allow imposition of the maximum penalty for murder against persons of those ages.

1). Alaska has no age limitation restricting waiver and transfer of individuals less than 18 years to criminal court. Alaska Stat. §410.060. Any person waived to stand trial as an adult is subject to the maximum punishment of imprisonment for 99 years. Alaska Stat. §12:55:125.

2). Hawaii permits transfer of a person 16 or 17 years old to criminal court upon waiver of jurisdiction by the family court after a hearing. HRS §571-22. The maximum punishment carries a penalty of life imprisonment without possibility of parole subject to commutation after twenty years to life imprisonment with parole. HRS §706-656.

3. Iowa allows waiver of any individual between 14 and 18 years old. A person waived from juvenile court is subject to the maximum penalty of life in prison. 37 ICA §902.1.

4). Kansas permits 16 and 17 year olds to be waived to adult criminal court. Certain categories of 16 year olds are exempt from juvenile court jurisdiction and subject to prosecution as an adult. Kan.Stat.Ann.§§21-3611, 38-1602(b)(3)(4)(6); 38-1604(a). There is no restriction for imposing the maximum penalty of life in prison on this class of individuals. Kan.Stat.Ann. 45-21-4501(a).

5). Maine has no age limitation in its waiver statute. Chapter 503, Title 15-3101. A

sentence of life in prison is the maximum penalty which may be imposed. Chapter 51, Title 17A-1152.

6). Massachussetts juvenile courts have no jurisdiction over 17 year olds. Mass.Gen.Laws Ann. 119 §21. Fourteen, 15 and 16 year olds may be waived to adult criminal courts. Id. The maximum penalty which may be imposed is life imprisonment. Id. 265 §2.

7). Michigan treats 17 year olds as adults with juvenile courts having concurrent jurisdiction of offenders between 17 and 18 years of age and charged with certain enumerated offenses or conduct. Mich.Laws Ann. §712A.2(d). Waiver is allowed for individuals age 15 and 16 charged with committing felonies. Id. 712A.4(1). The maximum penalty is life imprisonment. Id. 750.316.

8). Minnesota permits waiver of individuals aged 14, 15, 16 and 17. Waiver is mandatory in certain cases and a prima facie case of nonamenability to treatment within the juvenile court system is considered established if the individual is charged with certain enumerated

offenses. Minn.Stat.Ann. §260.125(1)(3)(3a). The maximum period of incarceration is life. §609.10.

9). New York juvenile courts have no jurisdiction over any individual older than 16. Juvenile court jurisdiction is also excluded for individuals aged 13 or older charged with second degree murder and individuals 14 and older charged with second degree murder or other enumerated violent crimes. N.Y.Fam.Ct.Act §301.2(1)(b) (McKinney 1983); N.Y. Penal Law §§10(18), 30(2) (McKinney Supp. 1987); N.Y.Crim.Pro.Law §§180.75, 190.71, 210.43, 220.10(5)(g) (McKinney 1982 and Supp. 1987). The maximum penalty for a juvenile offender (under 16) is life with an indeterminate sentence of a minimum of not less than 5 years but not to exceed 9 years and a maximum of at least 3 years. CLS, Penal Law §70.05.

10). North Dakota allows persons 14, 15, 16 and 17 to stand trial as adults after a waiver hearing. In the case of 14 and 15 year olds the charged offense must involve infliction or threat of serious bodily harm. Sixteen and 17 year olds may request waiver and transfer. N.D. Cont.Code

§27-20-34(1). The maximum punishment is life without eligibility for parole for 30 years, less sentence reduction for good conduct. N.D. Cont. Code §2.1-32.01.

11). Rhode Island permits waiver of 16 and 17 year olds charged with indictable offenses. R.I. Gen.Laws Ann. §14-1-7. The maximum penalty for murder is life without eligibility for parole. R.I. Gen. Laws Ann. §§11-23-2, 12-19.2-1.

12). West Virginia permits waiver from juvenile court of any person charged with murder regardless of age. W.Va. Code Ann. §49-5-10(c)(d). The maximum sentence is life without parole unless the jury recommends mercy. W.V. Code Ann. §62-3-15.

13). Wisconsin allows persons 16 and 17 to be waived from juvenile court jurisdiction to stand trial as adults. The maximum penalty for first degree murder is life in prison. Wisc. Code §§939.50(3)(a), 940.01.

14). Vermont has no juvenile court jurisdiction of delinquents over 16. Vt.Stat.Ann. Title 33 §632(a)(1). Waiver is allowed for

individuals 10 years of age but less than 14 for murder and other enumerated crimes. Id. Title 33, §635A(a). Juvenile courts have no jurisdiction over persons 14 and 15 charged with murder or certain other crimes unless the case is transferred from criminal court to juvenile court. The maximum penalty for murder in the first degree is life imprisonment for a minimum term of 35 years; with a finding of mitigation, for a minimum of not less than 15 years; up to and including life without parole. T.123 §2303(a).

The plurality and concurring opinions in Thompson assume that the 14 States which do not impose capital punishment contribute to a societal consensus that the death penalty is inappropriate for 15 year olds. These States proscribe the death penalty for all persons regardless of age. These States reflect a minority view. Even though these States prohibit capital punishment, all 14 recognize that some young offenders should be treated as adults in terms of culpability and accountability for crimes they commit. Once the determination is made that teenaged offenders

should be tried as adults and held responsible for their violent acts, no limitation is placed on the maximum penalty which may be imposed. They are to be treated as any other adult criminal. The juvenile justice system no longer affords them protection from punishment merely because of age. The societal consensus of all 14 non-capital States is that 16 and 17 year olds[6/], by reason of age alone or the serious nature of the offense or other considerations determined by waiver hearings, should be subject to the most severe punishment authorized by their statutes. There is no consensus among these 14 States that 16 and 17 year olds should not suffer maximum penalties. The consensus shows the contrary.

V.

NO SOCIETAL CONSENSUS EXISTS THAT 16 AND 17 YEAR OLDS SHOULD BE EXEMPTED FROM TO THE DEATH PENALTY.

Among the 36 States which endorse capital punishment, there is no consensus of a minimum age

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6/. Since execution of persons committing capital crimes when age 16 or 17 is before the Court, ages younger than 16 are not discussed.

at which defendants may be sentenced to death. Seven States, Arizona, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina and Wyoming, have no age limitation. South Dakota specifies a minimum age of 10 years. Montana specifies age 12; Mississippi age 13; Alabama, Idaho, Missouri, North Carolina, and Utah age 14. Arkansas, Louisiana and Virginia have a minimum age limitation of 15. Indiana, Kentucky, Nevada and Washington limit execution to individuals age 16 or older. Georgia, New Hampshire and Texas specify a minimum age limitation of 17. California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Mexico, Ohio, Oregon and Tennessee draw the line at 18 years of age. (See footnote 4.)

There is no broad agreement among the States at what age capital punishment can be imposed. Since no societal consensus can be discerned from legislative enactments, no bright-line should be drawn prohibiting the death penalty for any person under 18 years of age.

Analysis of jury deliberations and verdicts affords no evidence of consensus as to the

appropriateness of executing 16 and 17 year old murderers. Petitioners and their amici assume that since few 16 and 17 year olds have received the death penalty or been executed, it must mean there is a general abhorrence throughout society of inflicting the death penalty on persons of those ages. Petitioners' proposition fails to account for the realities of the juvenile justice system.

The Office of Juvenile Justice and Delinquency Prevention recently commissioned a research, test and demonstration study (The Juvenile Serious Habitual Offender/Drug Involved Program) which focused on serious, chronic, violent juvenile offenders.

The SHO/DI program found that most juvenile delinquents:

> ". . . do not even make it into court. Rather, they are diverted out of the juvenile justice system, early in the process, often before they ever get to court. According to Paul Strasburg:7/ Between 80 and 90 percent of arrested children are diverted or dropped from the judicial

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7/. Strasburg is the author of Violent Delinquents, A Report to The Ford Foundation.

> process with little or no supervision. Half are diverted by the police themselves. And up to two-thirds of the cases left may be withdrawn, dismissed, or adjourned in contemplation of dismissal."8/

Data analysis obtained during the program revealed that the "serious juvenile population is very, very small. Overall, they represent less than one percent of the entire juvenile population."9/

The fallacy of Petitioners' reliance on jury verdicts and the conclusions drawn therefrom become apparent when other factors such as the following are considered:

1). The relatively small number of violent juvenile offenders.

2). The disproportionate number of juveniles diverted or never brought into the juvenile justice system, much less the criminal system.

8/. Juvenile & Family Court Journal, 1986, Vol. 37, No. 5, p.28. "Chronic Serious Juvenile Offenders", Wolfgang Pindur, Ph.D., and Donna K. Wells. (Pindur is the National Field Manager of the SHO/DI Program; Wells is also associated with the program.)

9/. Id. at 28.

3). The safeguard of waiver hearings by juvenile courts before transfer of offenders to criminal court.

4). The fact that several States have no death penalty at all.

5). The consideration by juries of the mitigating factor of the defendant's youth.

The fact there are few jury verdicts sentencing 16 and 17 year olds to death does not indicate a consensus against such penalties. All indicators suggest instead that there are few opportunities to even consider them.

The violence of chronic youthful offenders is recognized as the major problem confronting the juvenile justice system.[10/] The National Council of Family Court Judges attempted to address this problem by endorsing 38 recommendations. Among the

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10/. Juvenile & Family Court Journal, 1985, Vol.36, No.2, pp. 27-28, "The Juvenile & Serious Habitual Offender/Drug Involved Program: A Means To Implement Recommendations Of The National Council Of Juvenile & Family Court Judges" by Wolfgang Pindur, Ph.D., and Donna K. Wells commenting on the March 1984 report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC).

various recommendations, two are particularly relevant to the issue presented to this Court.

> "Recommendation #1: Serious Juvenile Offenders Should Be Held Accountable By The Courts. The primary focus of the juvenile court for the disposition of serious chronic or violent juvenile offenders should be accountability. Dispositions of such offenders should be proportionate to the injury done and the culpability of the juvenile and to the prior record of adjudication if any.
>
> 'In conjunction with this recommendation, the Council acknowledges that "the principal purpose of the juvenile justice court system is to protect the public.'"11/
>
> "Recommendation #13: Offenders Unamenable To Juvenile Treatment Should Be Transferred. The judges note that "there are juveniles for whom the resources and processes vailable to the juvenile court will serve neither to rehabilitate the juvenile nor to protect the public."

Juvenile court judges face the problem of violent youths every day. These recommendations acknowledge actual experience and observation that persons of any age engaging in violence should and must be held accountable for their actions. By

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11/. Id. at 31.

their acts, some youths have placed themselves beyond the pale of treatment recognized as appropriate for other individuals of their age group. The remedy left to society at this point is to treat these anomalies of the juvenile justice system as it would any other violent offender. The individual violent youth's culpability and society's expectations of accountability demand nothing less.

The Council's recommendations do not include a call for abolition of the death penalty for youths. This non-recommendation becomes conspicious by its absence. It must be assumed that juvenile court judges are aware that once a juvenile is transferred to stand trial on murder charges as an adult, the State may impose its maximum penalty. In 25 States, this includes the possibility of death for persons less than 18 years of age. The Council's silence on this question lends support to amici's position that no national consensus exists condemning the death penalty for persons under 18 years old.

VI.

THE INTERNATIONAL TREATIES RELIED UPON BY THE PETITIONERS AND THEIR AMICI HAVE NO APPLICATION WHATSOEVER IN THESE CASES.

The petitioner and several of their amici[12] claim that international treaties, three in particular, require this Court to exempt 16 and 17 year old murderers from capital punishment aside from Eighth Amendment grounds.

Such contentions are not fairly included in the question for which certiorari was granted, i.e., whether the Eighth and Fourteenth Amendments to the United States Constitution forbid capital punishment of such killers. See United States Supreme Court Rule 21.1(a); See also Buchanan v. Kentucky, 483 U.S. __, 107 S.Ct. 2906, 2908, n. 1 (1987), refusing to consider claims extraneous to the questions for which certiorari had been granted.

Two of the treaties relied upon by the petitioners' amici are the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. Neither has been

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12/. Amnesty International, Defense For Children International, and International Human Rights Law Group.

ratified by the United States. The third treaty they cite is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Although the United States has ratified that pact, it applies only during war and even then does not prevent any country from executing its own citizens. See 6 U.S.T. 3516, 3520, 3522.

VII.

THE LAWS AND CUSTOMS OF FOREIGN COUNTRIES ARE IRRELEVANT TO THE QUESTION OF WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROHIBIT CAPITAL PUNISHMENT OF JUVENILE MURDERERS.

The most unreliable consideration asserted by the petitioners and their amici is that which concerns the laws and customs of foreign countries. Although the Thompson plurality relied upon the position taken by Western European and other Anglo American nations[13/], closer inspection reveals that 19 of those 22 countries have no death penalty at all for "ordinary crimes" (except

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13/. Respondent's list of these countries would consist of Australia, Austria, Belgium, Canada, Denmark, Finland, France, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweeden, Switzerland, the United Kingdom and West Germany.

wartime offenses or under circumstances not at issue here). See Amicus Curiae Brief For Amnesty International, A1-A7. The other three such nations have not executed a criminal for at least 10 years. Id. If these figures were extrapolated to the United States, one would expect nationwide opposition to the imposition of capital punishment for any "ordinary" homicide. In fact, precisely the opposite is true. Tison v. Arizona, 483 U.S.___, 107 S.Ct. 1676 (1987); Gregg v. Georgia, supra.

The unreliability of such cross-national comparisons is attributable to not only the substantial differences in culture and heritage, but to the very nature of crime in other countries. According to available information, the per capita homicide rate in the United States would appear to be from two to 10 times that of virtually all of the nations discussed above.[14/] It cannot reasonably

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14/. Landau, "Trends in Violence and Aggression: A Cross Cultural Analysis," 22 Annales Internationales de Criminologie (International Annals of Criminology) 119, 130-131 (1984); Wolfgang and Zahn, "Homicide: Behavioral Aspects," 2 Encyclopedia of Criminal Justice 848, 850-851 (1983).

be said that this fact is insignificant in forming the attitudes of other countries with regard to capital punishment, or that the same judgment would be made if these nations had a comparable homicide rate. An additional difficulty of this kind arises with particular regard to the present issue of murders by juveniles. It has never been shown that comparable problems exist in other countries, and in fact there is evidence to the contrary.[15/] Since independent and reliable evidence exists which establishes a consensus in the United States allowing the execution of 16 year olds who commit a capital homicide, no need arises to examine the positions taken by other countries on the basis of their own national experiences.

15/. "[I]n contrast to the pattern in the United States, the increase in crime found so prominently among the young people in Europe seems to have been concentrated among young adults between eighteen to twenty-five years of age instead of youths under eighteen." Ferdinand, "Crime Statistics: Historical Trends in Western Society," 1 Encyclopedia of Criminal Justice 392, 399 (1983).

VIII.

THE DELUGE OF ANTI-DEATH PENALTY BRIEFS FILED BY PETITIONERS' AMICI IS NOT A RELIABLE INDICATOR OF NATIONAL CONSENSUS ON THE PARTICULAR ISSUE PRESENTED HERE.

In a concerted and well organized effort to persuade this Court, which they are entitled to do, 34 different organizations have filed or joined amici curiae briefs on behalf of the petitioners. These groups[16/] largely oppose capital punishment

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16/. West Virginia Council of Churches, The American Baptist Churches, The American Friends Service Committee, The American Jewish Committee, The American Jewish Congress, The Christian Church (Disciples of Christ), The Mennonite Central Committee; The General Conference Mennonite Church; The National Council of Churches, James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church, The Southern Christian Leadership Conference, The Union of American Hebrew Congregations, The United Church of Christ Commission for Racial Justice, The United Methodist Church General Board of Church and Society, The United States Catholic Conference, Amnesty International, Defense For Children International, International Human Rights Law Group, National Legal Aid And Defender Association, National Association of Criminal Defense Lawyers, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, American Society for Adolescent Psychiatry, American Orthopsychiatric Assocation, and the American Bar Association.

under any conceivable circumstances.[17/] Several of these organizations are already suggesting that the "bright line" should be drawn beyond the age of 18. E.g., the American Society for Adolescent Psychiatry, the American Orthopsychiatric Association (at 4, 5, n.5), the National Legal Aid And Defender Association, the National Association of Criminal Defense Lawyers (at 28, n.13), the Defense for Children International (at 58-59, n.71), the West Virginia Council of Churches (at 12).

If this Court were making a legislative judgment as to whether those who commit a capital homicide at age 16 should be eligible for the death penalty, the views of "respected professional organizations" might well be relevant, both as arguments on the merits of the proposed legislation and as an expression on the part of the small segment of society which such groups represent. The views of these individual interest groups, however,

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17/. A notable exception is the American Bar Association, which five times in its amicus brief disclaims any general opposition to the death penalty. Id. at 2, 3, 5, 8 and 11.

are not reliable "objective factors" in judging whether a national consensus exists against the execution of 16 and 17 year old killers. By definition, positions taken on behalf of a particular organization at most represent the opinion of its members, not society as a whole. Since no need exists for those entities which approve an existing practice to formally state that fact, resolutions of this character inevitably represent the voices in opposition. Consequently, Georgia and Missouri do not attempt to inundate this Court with amici curiae briefs by the countless victims rights groups which more accurately reflect societal consensus.

As this Court has acknowledged, it is not designed or intended to reflect the views of society, as are legislative or other representative bodies. Gregg v. Georgia, supra, 428 U.S. at 175-176. In paying heed to these groups which have gone to the effort of expressing formal opposition on the present issue, there is a considerable risk of mistaking the clamor of organized protest for a settled national consensus.

IX.

THIS COURT SHOULD NO MORE DRAW A "BRIGHT LINE" FOR CAPITAL PUNISHMENT INELIGIBILITY THAN PRESCRIBE A UNIFORM AGE RANGE FOR JUVENILE JURISDICTION, PROHIBIT TRANSFER THEREFROM, OR RIGIDLY DEFINE THE CIRCUMSTANCES UNDER WHICH INDIVIDUAL EXCEPTIONS THERETO COULD BE MADE.

A ruling by this Court that juveniles are invariably too immature for capital punishment would establish precedent for exempting them from lesser penalties on the same ground.

At least for the time being, the petitioners and their amici do not challenge the prerogative of State legislatures to establish various age ranges for juvenile court jurisdiction. Neither do they, as yet, argue that the transfer of individual offenders from juvenile court for trial as adults is constitutionally prohibited. And although Kent v. United States, 383 U.S. 541, 557 (1966) extends minimum Due Process standards to juvenile transfer proceedings, not even the defense bar suggests that the Court should prescribe the criteria for determining whether a particular offender deserves to be treated as an adult.

State legislatures set the maximum age for juvenile jurisdiction as high as they do to benefit

every arguably immature offender, even at the obvious expense of including many individuals who do not deserve such protection. By using this approach to reach beyond the common denominator of chronological immaturity, the States are justified in examining each juvenile individually to determine whether an exception should be made in his or her particular case. As the Court has emphasized on prior occasions, maturity and sophistication are factors which vary from individual to individual, so chronological age is only one of the various circumstances that should be taken into account.

> Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully "street wise", hardened criminals deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In Re Gault, 387 U.S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have.

Fare v. Michael C., supra, 442 U.S. at 734, n.4.

All the States recognize the special mitigation of youth in their juvenile transfer proceedings long before they do so, again, in capital sentencing trials. Consequently, there is no more reason for this Court to draw a "bright line" age requirement for capital punishment than there is for it to do so in the context of juvenile jurisdiction waiver proceedings. In both situations that decision is better left to the individual States whose legislative determinations, for the sake of comity, should be accorded deference by the federal judiciary.

X.

THE APPROPRIATENESS OF A DEATH SENTENCE SHOULD CONTINUE TO BE DETERMINED ON AN INDIVIDUAL BASIS.

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.' California v. Brown, 479 U.S. 538, ___ 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)." Thompson at 2698.

Guided, individualized consideration of the offender's character and the circumstances of his

crime is the touchstone of capital sentencing. See Zant v. Stephens, 462 U.S. 862, 879 (1983), collecting cases. Gregg v. Georgia, 428 U.S. 153 (1976) and its progeny are intended to avoid the kind of "rigid", "mechanical" and "wholly arbitrary".determination urged here by the petitioners. Barclay v. Florida, 463 U.S. 939, 950 (1983). No particular circumstance of a capital offender's crime should automatically require the death penalty, Woodson v. North Carolina, 428 U.S. 280 (1976), Roberts v. Louisiana, 428 U.S. 325 (1976), or automatically foreclose it, Tison v. Arizona, supra. Rather, the sentencer must be "free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008 (1983). Youthfulness is only one such factor and it is not necessarily the most important.

Maturity varies from individual to individual. Some individuals never attain it; some do at an age labeled "child." "Some of the older minors become fully 'street wise' hardened

criminals, deserving no greater consideration than that properly afforded all persons suspected of crime." Fare v. Michael C., supra, 442 U.S. at 734, n.4.

The need for individual consideration of the defendant's character and the circumstances of the crime becomes glaringly apparent now that a question of High's true age has been raised. Has High suddenly become more deserving of the death penalty as a 19 year old murderer, or less deserving of death penalty as a 17 year old murderer? Neither the circumstances of the crime nor the defendant's character at the time he committed the crime have changed. There is no reason relating to the crime or the defendant which should preclude the death penalty for High. To draw a bright-line rule prohibiting execution of anyone less than 18 years of age, and thus prohibiting High's execution if Georgia cannot establish his age at 19, undermines the very purpose of individualized sentencing of offenders, which is to fashion a sentence appropriate to the crime.

XI.

SIXTEEN AND 17 YEAR OLD CRIMINALS WHO ARE TRIED AS ADULTS RECEIVE THE BENEFIT OF INDIVIDUALIZED CONSIDERATION TWICE, WHEN TRANSFERRED FROM THE JUVENILE COURT AND AGAIN WHEN THEY ARE TRIED AS ADULTS.

No national policy of automatic exemption for 16 and 17 year olds from the death penalty exists. For those 16 and 17 year olds subject to juvenile court jurisdiction, waiver proceedings provide individual consideration of whether the offender can best be served by the juvenile or criminal justice system. Kent v. United States, supra, 383 U.S. at 557 requires a hearing, assistance of counsel and a statement of reasons for the transfer. These minimum Due Process rights provide additional safeguards that offenders with presumptive juvenile status will not be arbitrarily reclassified as adults.

In all States where 16 or 17 year olds are eligible for the death penalty, their youth must be presented as a mitigating factor to the sentencer. Eddings v. Oklahoma, 455 U.S. 104 (1982).

Twenty-nine States[18/] have adopted the holding of Eddings through legislation designating the defendant's age as a mitigating factor in capital cases.

In every trial where death is a possible penalty, a 16 or 17 year old will be accorded consideration of his youth in the assessment of punishment. Age alone should not exclude a punishment otherwise deemed appropriate considering the defendant's character and criminal act.

18/. Ala.Code §13A-5-51(7) (Repl.1982); Ariz.Rev. Stat.Ann.§13-703(G(5)(Supp. 1987); Ark.Code Ann. §5-4-605(4)(1987); Cal.Penal Code §190.05(h)(9)(West 1988); Col.Rev.Stat.§16-11-103(5)(a)(Repl.1986); Conn.Gen.Stat.Ann.§53a-46(a)(g)(1)(1987); Fla.Stat. Ann.§921.141(6)(g)(1985); Ind.Code Ann. §35-50-2-9(c)(7)(Cum.Supp.1988); Ky.Rev.Stat.Ann. §532.025(2)(b)(8)(Cum.Supp. 1988); La.Code Crim. Proc., art. 905.5(f)(1984); 27 Md.Code §413(g) (5)(Repl.1988); Miss.Code Ann. §99-19-101(6) (g)(Cum.Supp. 1987); Mo.Rev.Stat. §565.032.3 (7)(1986); Mont.Code Ann. §46-18-304(7)(1987); Nebr.Rev.Stat. §29-2523(2)(d)(1985); Nev.Rev. Stat.§200.035.6 (1987); N.H.Rev.Stat.Ann. §630.5(11)(b)(5)(1986); N.J.Stat.Ann. §2C:11-3 (c)(5)(c)(Supp. 1988); N.M.Stat.Ann. §31-20A-6 (1)(Repl.1987); N.C. Gen.Stat.§16A-2000(f)(7)(Supp. 1987); Ohio Rev.Code Ann. §2929.04(B)(4)(1986); Ore.Rev.Stat. §163.150(1)(b)(B)(Supp. 1988); 42 Pa.Cons.Stat.Ann. §9711(e)(4)(Supp.1987); S.C.Code Ann. §16-3-20(C)(b)(7,9)(Supp.1987); Tenn.Code Ann.§32-2-203(j)(7)(1982); Utah Code Ann. §76-3-207 (2)(e)(Supp. 1988); Va.Code Ann. §19.2-264.4(B) (v)(Repl. 1983); Wash.Rev.Code §10.95.070(7) (Cu.Supp. 1988); Wyo.Stat.§6-2-102(j)(vii)(1988).

CONCLUSION

WHEREFORE, the opinions below should be affirmed.

Respectfully submitted,

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